Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

HANNAFORD BROS. CO.,

Petitioner,

v.

THERESA CIAMPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state workers' compensation statute, requiring employers who administer ERISA-covered employee benefit plans to include in an inactive employee's average weekly wage "any fringe or other benefit that does not continue during the disability," relates to an ERISA-covered employee benefit plan within the meaning of ERISA's preemption provisions, and conflicts with the holdings of this Court in *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992).

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PETITION FOR A WRIT OF CERTIORARI

Hannaford Bros. Co. petitions this Court for a writ of certiorari to review a decision of the Supreme Judicial Court of Maine.

OPINIONS BELOW

The July 26, 1996 decision of the Supreme Judicial Court of Maine is reported at 681 A.2d 4. (App. 1-11). The April 19, 1995 decision of the State of Maine Workers' Compensation Board is not reported. (App. 12-14).

The Supreme Judicial Court of Maine granted Petitioner's petition for appellate review pursuant to 39-A M.R.S.A. § 322.

JURISDICTION

The decision of the State of Maine Workers' Compensation Board was issued on April 19, 1995. The judgment of the Supreme Judicial Court of Maine determining that ERISA does not preempt the state statute was entered on July 26, 1996.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The case involves both the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.

§§ 1001-1461, and provisions of the Maine Workers' Compensation Act of 1992 ("MWCA"), 39-A M.R.S.A. §§ 101-909 (Supp. 1996).

The relevant provisions of ERISA provide as follows:

29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1003

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained –

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if –

. . .

> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws. . . .

The relevant provisions of MWCA provides as follows:

> **39-A M.R.S.A. § 102.**
>
> As used in this Part, unless the context otherwise indicates, the following terms have the following meanings.
>
> . . .
>
> 4. Average weekly wages or average weekly wages, earnings or salary. The term "average weekly wages" or "average weekly wages, earnings or salary" is defined as follows.
>
> A. "Average weekly wages, earnings or salary" of an injured employee means the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured. . . .
>
> . . .
>
> H. "Average weekly wages, earnings or salary" does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or

other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury.

STATEMENT OF THE CASE

This petition for a writ of certiorari arises from a judgment of the Supreme Judicial Court of Maine ("Law Court") holding that ERISA does not preempt 39-A M.R.S.A. § 102(4)(H) ("Section 102(4)(H)"), a state statute requiring employers, under certain circumstances, to include in the computation of a workers' compensation average weekly wage the value of the fringe benefits afforded the employee via the employer's ERISA-covered benefit plan.

The facts of this case are not in dispute and, along with the procedural history, may be summarized as follows: Respondent Theresa Ciampi suffered a work related injury on January 30, 1993 while employed by Petitioner Hannaford. Respondent sought and received workers' compensation benefits for her injury. While an active employee of Petitioner, Respondent received fringe benefits including medical, dental and group life insurances, as well as pension, 401(k) and profit-sharing plans. These benefits were discontinued during the period of Respondent's disability.

Although Respondent's workers' compensation benefits were set at a level in accordance with her average weekly wage at the time of her injury, Respondent filed a petition with the State of Maine Workers' Compensation Board (the "Board") seeking, pursuant to Section 102(4)(H),[1] to include in her average weekly wage the value of the fringe benefits that she had been receiving while an active employee of Petitioner.[2]

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[1] 39-A M.R.S.A. § 102(4) provides in pertinent part:

> 4. Average weekly wages or average weekly wages, earnings or salary. The term "average weekly wages" or "average weekly wages, earnings or salary" is defined as follows.
>
> A. "Average weekly wages, earnings or salary" of an injured employee means the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured. . . .
>
> . . .
>
> H. "Average weekly wages, earnings or salary" does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury.

[2] Pursuant to the provisions of Section 102(4)(H), the Petitioner, and like employers, are given the "choice" of either continuing the employee's fringe benefits while the employee is inactive, or paying the cash equivalent by increasing the employee's average weekly wage. Given that this Court has

Petitioner objected to Respondent's petition, asserting that Section 1144(a) of ERISA preempted Section 102(4)(H). The Board, however, determined that it was without jurisdiction to address the preemption issue and, accordingly, proceeded to consider Respondent's petition pursuant only to state law. (App. 14). Applying Section 102(4)(H), the Board granted Respondent's petition, finding that including in her average weekly wage the value of the fringe benefits would not result in weekly compensation greater than two-thirds of the state average weekly wage. (*Id.*).

The Law Court granted Petitioner's timely appeal from the decision of the Board. In its judgment affirming the Board's decision and rejecting Petitioner's ERISA preemption argument, the Law Court first noted that "[t]here is no dispute that Hannaford's fringe benefit package qualifies as [an employee benefit plan] for purposes of ERISA." *Ciampi v. Hannaford Bros. Co.*, 681 A.2d 4, 7, n.1 (Me. 1996) (App. 4). The Law Court furthermore acknowledged the broad preemption provision of ERISA as well as this Court's decision in *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992), which mandated that "because health insurance plans are regulated by ERISA, 'any state law imposing requirements by reference to such covered programs must yield to ERISA.' " *Ciampi*, 681 A.2d at 7 (quoting *Greater Washington*, 506 U.S. at 130-31) (App. 5-6).

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already prohibited states from requiring the continuation of actual benefits, *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992), the state is limited to requiring only the latter.

The Law Court nevertheless determined that ERISA does not preempt Section 102(4)(H), finding, *inter alia*, that the statute

> has only an indirect impact on ERISA-regulated benefit plans. . . . Had the [Maine] Legislature intended to encourage employers to continue benefits during the course of an employee's disability, it would have applied section 102(4)(H) across the board to all employees, as the District of Columbia had done with its statute in *Greater Washington*, and not merely to those employees whose weekly benefits are less than two-thirds of the state average weekly wage on the date of the injury.

Id. at 8, 9 (App. 6, 10).

In support of this holding, the Law Court cited similar statutes from other jurisdictions, noting that "Maine is not alone in permitting the consideration of fringe benefits in an employee's pre-injury wage." *Id.* at 8 (citing ALA. CODE § 25-5-1(6) (1992); ALASKA STAT. §§ 23.30.220, 265(15) (1990); COLO. REV. STAT. § 8-70-101 (Supp. 1995); FLA. STAT. ANN. § 440.02(24) (West Supp. 1993); KAN. STAT. ANN. § 44-511(a)(2) (1993); MICH. COMP. LAWS § 418.371(2) (1985); *Ebmer v. Wayne Village*, 494 N.W.2d 842, 844 (Mich. App. 1992);[3] 2A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 60.12(b) (1993)) (App. 8).

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[3] The court in *Ebmer v. Wayne Village, supra*, did *not* address federal preemption of the statute cited by the Law Court in *Ciampi*. Rather, the *Ebmer* court determined only that "the employer's social security and unemployment compensation contributions and the employer's payments to secure workers'

REASONS FOR GRANTING THE WRIT

The decision below arises out of an effort by the State of Maine to evade both the holding and import of this Court's decision in *Greater Washington*. The decision represents a growing trend in this respect, and poses a present, significant threat to the federally preemptive scheme that is at the heart of ERISA. By denying the writ, the Court will add impetus to this trend, thus undercutting the important policies of uniformity, as articulated by this Court in *Greater Washington*, that Congress sought to further in crafting the broad preemptive provisions within ERISA. The issue is well developed and well framed on the record in this case, and addresses a subject matter that directly affects ERISA plan administrators that do business in any of the multitude of states that have joined this trend.

I. THE DECISION BELOW POSES A PRESENT AND GROWING THREAT TO THE FEDERAL REGULATORY UNIFORMITY MANDATED BY CONGRESS.

One of the principle goals of ERISA was the creation of a uniform regulatory scheme for employee benefit plans. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). This scheme "is difficult to achieve . . . if a benefit plan is subject to differing regulatory requirements in differing States." *Id.*

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compensation benefits are not to be included in computing an injured worker's average weekly wage. . . . " *Ebmer*, 494 N.W.2d at 843.

To achieve the goal of national uniformity, ERISA maintains, in 29 U.S.C. § 1144(a), a broad preemption provision that supersedes any State law that "may now or hereafter relate to any employee benefit plan" described in, and not exempted by, ERISA. "The only relevant state laws, or portions thereof, that survive this pre-emption provision are those relating to plans that are themselves exempted from ERISA's scope." *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 523, n.20 (1981); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (emphasizing that ERISA's preemption clause is not limited to "state laws specifically designed to affect employee benefit plans."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (noting the breadth and importance of ERISA's preemption provision as intended by its House and Senate sponsors: "[T]he 'reservation to Federal authority the sole power to regulate the field of employee benefit plans' [i]s ERISA's 'crowning achievement.' ") (citing 120 Cong. Rec. 29197 (1974) (statement of Rep. Dent)).

The interplay between ERISA and state workers' compensation laws is "unusually important," *Greater Washington*, 506 U.S. at 132 (*Stevens, J.*, dissenting), and provides a frequent threat to the uniformity envisioned by Congress. In *Greater Washington* the Court found preempted a District of Columbia law stating that employers that provide health benefits to their active employees must provide equivalent benefits to an out of work employee receiving workers compensation. By that decision, this Court attempted to draw a firm line protecting the uniformity of benefit plan regulation in furtherance of congressional intent.

Notwithstanding this guidance, state legislatures persist in attempting to circumvent *Greater Washington*. Rather than ordering the payment of ERISA benefits, the current approach is for the state to order the payment of the value of ERISA benefits. *See, e.g.*, 39 M.R.S.A. § 102(4)(H); ALA. CODE § 25-5-1(6) (1992); ALASKA STAT. §§ 23.30.220, 265(15) (1990); COLO. REV. STAT. § 8-70-101 (Supp. 1995); FLA. STAT. ANN. § 440.02(24) (West Supp. 1993); KAN. STAT. ANN. § 44-511(a)(2) (1993); MICH. COMP. LAWS § 418.371(2) (1985). As explained in Part II, below, the "value of benefits" approach is in direct conflict with the principles articulated in *Greater Washington*, and is apparently predicated on the belief that this Court did not mean what it said in *Greater Washington*. In fact, the Maine law at issue here is *precisely* the type of law that Justice Stevens, in his dissent in *Greater Washington*, said was rejected by the majority decision. *Id.* at 133.

Review by this Court of the present case is necessary not only because the decision below subverts the principles articulated in *Greater Washington, see Alessi*, 451 U.S. at 525 ("ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision."), but more importantly, because the "value of benefits" approach is acquiring a momentum that poses a present, nationwide threat to the uniform regulation of ERISA benefits mandated by Congress. Last year, this Court denied a writ of certiorari from the decision of the Kansas Supreme Court upholding this approach. *See Lawrence Paper Co. v. Gomez*, 897 P.2d 134, 138 (Kan.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 187 (1995). The Maine Law Court in *Ciampi* has now cited the Kansas decision to sustain a similar law in Maine. *Ciampi*, 681

A.2d at 9 (App. 11). Last year's decision to deny certiorari in *Lawrence Paper* is thus enhancing the growth of a significant threat to regulatory uniformity, with long lasting ramifications that will not be remedied by a decision many years in the future.

Allowing this approach to stand and proliferate is counter to the very notion of uniformity intended by Congress in this area. Benefit plans (as here) often cover employees in many states, and require that the employer make long lasting decisions based on multiple year, actuarial calculations.

Finally, as explained below, the decision is so plainly contrary to the express holding in *Greater Washington* that granting the requested writ will not place a disproportionate demand on the Court's resources.

II. THE COURT BELOW ERRED ON THE MERITS

By including within its scope "[a]ny fringe or other benefit paid by the employer," Section 102(4)(H) plainly and expressly refers to ERISA-covered benefit plans. This Court has expressly held that such a reference, by itself, requires a finding of preemption. *Greater Washington*, 506 U.S. at 130 ("District's Equity Amendment Act . . . on that basis alone is pre-empted.").

Moreover, Section 102(4)(H) imposes its requirements by reference to benefit plans covered by ERISA. To wit, the plan administrator must reference the fringe benefits that were provided via the ERISA plan to the employee while active, compute their equivalent cash value, and increase the inactive employee's average weekly wage by

that amount. *See Greater Washington*, 506 U.S. at 130 ("Such employer-sponsored health insurance programs are subject to ERISA regulation . . . and any state law imposing requirements by reference to such covered programs must yield to ERISA.") (footnote omitted); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 136 (1990) (ERISA preempts claim "premised on" existence of ERISA-covered plan); *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 793-94 (1st Cir. 1995) (where determination of damages ultimately depended on analysis of an employee benefit plan, inquiry was directed to plan and cause of action was preempted); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994) (cause of action preempted where determination of employer's liability depended on existence of an ERISA-covered plan).

In a real economic sense, the decision below, if allowed to stand, guts this Court's decision in *Greater Washington* of any meaning. Requiring employers to pay the value of a benefit is no different than requiring the furnishing of an equivalent benefit. For example, as permitted by federal law, the Petitioner's benefit plan requires COBRA beneficiaries to pay the full cost of their coverage. *See* 29 U.S.C. § 1162(3). If the COBRA beneficiary is entitled to workers' compensation, however, Section 102(4)(H) effectively precludes the Petitioner from requiring this employee contribution because if the former employee remits the full cost of the COBRA coverage to the Petitioner, the Petitioner must simultaneously pay to that employee the "value" of the health benefits coverage (*i.e.*, the full cost of the COBRA coverage).

Justice Stevens formulated the issue in *Greater Washington* as "whether Congress intended to prevent a State

from computing workmen's compensation benefits on the basis of the entire remuneration of injured employees when a portion of that remuneration is provided by an employee benefit plan." *Id.* at 133 (*Stevens, J.*, dissenting). If Justice Stevens was correct in that formulation, then the issue here presented has been decided and, accordingly, this case is ripe for summary reversal. If Justice Stevens was incorrect, and the holding in *Greater Washington* is to be interpreted more narrowly, a definitive statement by the Court is necessary to enable ERISA administrators at least to plan accordingly in assessing the costs of benefit plans.

CONCLUSION

The decision of the Supreme Judicial Court of Maine, interpreting the broad preemption provision within ERISA in a way that permits the State (and other states with similar statutes) to require employers to provide in cash what it cannot require in actual coverage, subverts congressional intent and is in conflict with the principles articulated in the precedents of this Court. This petition

should be granted to resolve this conflict and to restore among the states uniform application of ERISA.

Respectfully submitted,

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Theresa CIAMPI

v.

HANNAFORD BROS. CO.

Decision No. 7747.
Law Docket No. WCB-95-276.

Supreme Judicial Court of Maine.

Argued June 13, 1996.

Decided July 26, 1996.

James J. MacAdam (orally), McTeague, Higbee, Macadam, Case, Watson & Cohen, Topsham, for Employee.

John F. Lambert, Jr. (orally) and Thomas W. Laprade, Black, Lambert, Coffin & Rudman, Portland, for Employer.

Before WATHEN, C.J., and ROBERTS, GLASSMAN, RUDMAN and LIPEZ, JJ.

ROBERTS, Justice.

Hannaford Bros. Co. appeals from a decision of the Workers' Compensation Board awarding its employee Theresa Ciampi weekly benefits based on a computation of her average weekly wage that included fringe benefits pursuant to 39-A M.R.S.A. § 102(4)(H) (Supp.1995). Hannaford contends that section 102(4)(H) is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001-1461 (1990)). We conclude that section 102(4)(H) does not "relate to" an employee benefit plan within the meaning of ERISA's preemption provision, and therefore we affirm the decision of the Board.

The facts of this case are not in dispute. Ciampi suffered a work-related injury on January 30, 1993, while employed by Hannaford. Her fringe benefits were discontinued during the period of her disability. Ciampi filed a petition for an award seeking the inclusion of fringe benefits, valued at $62.50 per week, in her average weekly wage. Because the inclusion of the fringe benefits would not increase her weekly benefits above two-thirds of the state average weekly wage at the time of her injury, the Board granted the petition. 39-A M.R.S.A. § 102(4)(H); Beaulieu v. Maine Medical Ctr., 675 A.2d 110, 111 (Me.1996). Concluding that it lacked jurisdiction to resolve issues of federal preemption, the Board declined to address Hannaford's argument that section 102(4)(H) is preempted by ERISA. We granted Hannaford's petition for appellate review pursuant to 39-A M.R.S.A. § 322 (Supp.1995).

ERISA was enacted in 1974 for the purpose of protecting the interests of employees and their beneficiaries in employer-provided benefit plans. The United States Supreme Court recently stated:

> [ERISA] does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans . . . as by imposing reporting and disclosure mandates, . . . participation and vesting requirements, . . . funding standards, . . . and fiduciary responsibilities for plan administrators. . . . It envisions administrative oversight, imposes criminal sanctions, and establishes a comprehensive civil enforcement scheme.

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., ___ U.S. ___, ___, 115 S.Ct. 1671, 1674-75, 131 L.Ed.2d 695 (citations omitted). ERISA also contains a broad preemption provision for the purpose of insuring uniformity in the laws relating to employee benefit plans. 29 U.S.C. § 1144(a). As the Supreme Court has explained:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987). In pertinent part, section 1144(a) provides that "[e]xcept as provided in subsection (b) of this section, the provisions of this title . . . shall supersede any and all State laws insofar as

they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. § 1144(a) (emphasis added). Subsection 4(b) provides that "[t]he provisions of this title shall not apply to any employee benefit plan if . . . (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b)(3).

Hannaford contends that 39-A M.R.S.A. § 102(4)(H) "relates to" an ERISA benefit plan and is therefore preempted by ERISA.[1] Section 102(4)(H) provides:

> H. "Average weekly wages, earnings or salary" does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of the injury.

The test for determining whether state legislation "relates to" an ERISA benefit plan is whether "in the

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[1] An "employee benefit plan" is defined as either a "welfare" or "pension" plan. Welfare plans are defined as providing medical, disability, death, accident, unemployment, or related benefits, while pension plans relate generally to retirement. 29 U.S.C. § 1002(1)-(3). There is no dispute that Hannaford's fringe benefit package qualifies as a welfare plan for purposes of ERISA.

normal sense of the phrase, . . . it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983). Hannaford rests its argument primarily on the Supreme Court's recent decision in District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992). Greater Washington dealt with a District of Columbia statute that required employers who provide health insurance coverage to employees to continue that coverage during the period that those employees receive workers' compensation benefits. Id. at 128, 113 S.Ct. at 582-83. The District of Columbia statute provided in pertinent part:

> (1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this act.
>
> . . . .
>
> (3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

Greater Washington Bd. of Trade v. District of Columbia, 948 F.2d 1317, 1319 (D.C.Cir.1991), aff'd sub. nom. District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513. The Supreme Court stated in Greater Washington that because health insurance plans are regulated by ERISA, "any state law

imposing requirements by reference to such covered programs must yield to ERISA." Greater Washington, 506 U.S. at 130-31, 113 S.Ct. at 584. The Court stated further that the District of Columbia statute "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted." Id. at 130, 113 S.Ct. at 583.

Hannaford contends that, pursuant to Greater Washington, any express reference to an ERISA plan, regardless of the intent of the statute or its actual connection with an ERISA plan, requires a finding that the law "relates to" an ERISA plan. Hannaford contends further that because section 102(4)(H) increases the cost of providing ERISA benefits, creates administrative burdens in existing ERISA plans, and subjects employers to conflicting multistate laws, it has a "connection with" ERISA benefit plans and is therefore superseded by ERISA. FMC Corp. v. Holliday, 498 U.S. 52, 60, 111 S.Ct. 403, 408-09, 112 L.Ed.2d 356 (1990). We disagree.

Section 102(4)(H) is plainly distinguishable from the District of Columbia statute at issue in Greater Washington. That statute compelled employers to provide an ERISA type benefit for employees receiving workers' compensation. Section 102(4)(H), by contrast, provides that the value of an employee fringe benefit plan must be considered in the calculation of an employee's average weekly wage for purposes of determining weekly workers' compensation benefits. Unlike the statute at issue in Greater Washington, section 102(4)(H) has only an indirect impact on ERISA-regulated benefit plans. In a recent case the Supreme Court stated, "[a]n indirect economic influence . . . does not bind plan administrators to any particular choice and thus function as a regulation of

an ERISA plan itself." New York State Conf. of Blue Cross, ___ U.S. at ___, 115 S.Ct. at 1679. Maine employers are not compelled to provide or continue ERISA-type benefits to injured employees, nor are they required to modify their ERISA plans or maintain a separate administrative structure to comply with the Maine statute. See Lawrence Paper Co. v. Gomez, 257 Kan. 932, 897 P.2d 134, 143 (1995) (Kansas statute permitting inclusion of fringe benefits in employee's average weekly wage is not preempted by ERISA).

ERISA does not preempt state legislation that has a " 'tenuous, remote, or peripheral' " connection to ERISA benefit plans. Greater Washington, 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n. 1 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. at 100, 103 S.Ct. at 2901). In Blue Cross the Supreme Court stated, "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.' " New York State Conf. of Blue Cross, ___ U.S. at ___, 115 S.Ct. at 1677 (quoting H. James, RODERICK HUDSON xli (New York ed. World's Classics 1980)). Moreover, ERISA does not shield plan administrators from any and all possible economic influences that may arise from state laws or regulations. Many traditional areas of state regulation, such as the regulation of workplace conditions or the formulation of quality standards for hospital services, can affect the cost of an ERISA plan but are not superseded by ERISA because they have only an indirect effect on plan administration. Id. at ___, 115 S.Ct. at 1679. The issue, for purposes of preemption, is whether Congress intended to foreclose the states from

exercising regulatory authority in a given area. Id. at ___, 115 S.Ct. at 1676. In cases "where federal law is said to bar state action in fields of traditional state regulation," such as workers' compensation legislation, there is an " 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest intent.' " Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

Maine is not alone in permitting the consideration of fringe benefits in an employee's pre-injury wage.[2] "[T]he purpose of calculating an average weekly wage is to arrive at an estimate of the 'employee's future earning capacity as fairly as possible.' " Nielsen v. Burnham & Morrill, Inc., 600 A.2d 1111, 1112 (Me.1991) (quoting Fowler v. First Nat'l Stores, Inc., 416 A.2d 1258, 1260 (Me.1980)). Statutes and judicial decisions that permit consideration of fringe benefits in the determination of an employee's pre-injury wage are premised on the practical reality that in some circumstances the money received in an employee's weekly pay envelope will not accurately reflect the employee's actual earning capacity. Ex Parte Murray, 490 So.2d 1238, 1240-41 (Ala.1986); Ragland v. Morrison-Knudsen Co., 724 P.2d 519, 522-23 (Alaska

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[2] See, e.g., ALA.CODE § 25-5-1(6) (1992), ALASKA STAT. §§ 23.30.220, 265(15) (1990); COLO.REV.STAT. § 8-70-101 (Supp.1995); FLA.STAT.ANN. § 440.02(24) (West Supp.1993); KAN.STAT.ANN. § 44-511(a)(2) (1993); MICH.COMP.LAWS § 418.371(2) (1985); Ebmer v. Wayne Village, 197 Mich.App. 307, 494 N.W.2d 842, 844 (1992); 2 A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 60.12(b) (1993).

1986); Murphy v. Ampex Corp., 703 P.2d 632, 633-34 (Colo.App.1985).

We are not persuaded that Congress, by its enactment of ERISA, intended to supersede state authority to calculate weekly workers' compensation benefits based on a fair estimate of an employee's earning capacity by including an employee's fringe benefits. Our conclusion is buttressed by Congress's express exemption of plans maintained solely for the purpose of complying with applicable state workers' compensation laws from the ERISA preemption provision. 29 U.S.C. §§ 1003(b)(3), 1144(a). Our result is also supported by decisions of the federal courts that states are not precluded from referring to ERISA benefits to calculate benefits for otherwise permissible purposes within the states' traditional authority. See, e.g., Thiokol Corp., Morton Int'l, Inc. v. Roberts, 76 F.3d 751, 755 (6th Cir.1996) (ERISA does not preempt Michigan tax based in part on employer payments to fringe benefit plans); Keystone Chapter, Associated Builders & Contractors v. Foley, 37 F.3d 945, 963 (3d Cir.1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1393, 131 L.Ed.2d 244 (1995) (ERISA does not preempt statute requiring public contractors to pay prevailing minimum wage calculated with reference to employer contributions to fringe benefit plans).

We reject Hannaford's argument that by excluding from the average weekly wage those fringe benefits that "continue during the disability" the Legislature intended a direct impact on ERISA plans by encouraging employers to continue fringe benefits during the course of an employee's disability. The legislative record is devoid of any reference to such an intent, and we do not

find any evidence of that intent in the plain statutory language. Had the Legislature intended to encourage employers to continue benefits during the course of an employee's disability, it would have applied section 102(4)(H) across the board to all employees, as the District of Columbia had done with its statute in Greater Washington, and not merely to those employees whose weekly benefits are less than two-thirds of the state average weekly wage on the date of the injury.

We are not unmindful of the legislative history of this issue following our 1989 decision in Ashby v. Rust Eng'g Co., 559 A.2d 774, 775 (Me.1989), in which we held that certain payments must be included in the average weekly wage when employee benefits are paid for by bargained-for, dollar-for-dollar deductions from an employee's pay. Clark v. Rust Eng'g Co., 595 A.2d 416, 419 (Me.1991). See also Fletcher v. Hanington Bros., Inc., 647 A.2d 800, 803 (Me.1994) (employee's voluntary deductions from weekly pay for health insurance must be included in average weekly wage). The Legislature's immediate response to Ashby was the enactment of P.L.1991, ch. 615, § A-20, which purported to overturn that decision and provided that fringe benefits may not be included in an employee's average weekly wage. 39 M.R.S.A. § 2(2)(G) (Supp.1991), repealed and replaced by Maine Workers' Compensation Act of 1992, P.L.1991, ch. 885, §§ A-7, A-8 (effective January 1, 1993); Tompkins v. Wade & Searway Constr. Corp., 612 A.2d 874, 876 (Me.1992). In light of this recent history, it is likely that the Legislature intended section 102(4)(H) to strike a balance between the Ashby rule and the rule of former section 2(2)(G) by providing a slightly greater

recovery to those employees with the lowest weekly benefits.

We conclude that section 102(4)(H) has only a "tenuous, remote, or peripheral" connection with benefit plans and is therefore not preempted by ERISA. Greater Washington, 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n. 1 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. at 100, 103 S.Ct. at 2901). Moreover, our decision is in accord with a recent opinion of the Supreme Court of Kansas addressing a Kansas statute similar in all key respects to Maine's section 102(4)(H). Lawrence Paper, 897 P.2d at 143.

The entry is:

Decision of the Workers' Compensation Board affirmed.

All concurring.

681 A.2d 4

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DATED MAILED:
APR 19 1995

Within 5 days after issuing this decision, the hearing officer may request that the full Workers' Compensation Board review the decision.

39-A M.R.S.A. §322(1) provides that any party in interest may present a copy of this decision to the clerk of the Law Court within 20 days after receipt of the notice of the filing of this decision.

THERESA CIAMPI
(Employee)

VS.

HANNAFORD BROTHERS COMPANY
(Employer)

and

HANNAFORD BROTHERS COMPANY
(Insurer)

Pending before the Board is the employee's Petition for Award. The parties have agreed that the only unresolved issue is the amount of the employee's average weekly wage which raises issues of what constitute fringe benefits under §102(H) and whether that whole section is pre-empted by ERISA, 29 USC §1001 et seq., a question this hearing officer is without the jurisdiction to decide.

FINDINGS OF FACT

1. On January 30, 1993 when Theresa Ciampi suffered a compensable injury at Hannaford Brothers her average weekly wage, without fringe benefits, was $389.30. Hannaford Brothers also made contributions for Ms. Ciampi to the following: Social Security, Medical, Dental, Disability, and Group Life Insurance, a retirement plan and a 401(k) plan.

2. The value of those benefits except for the 401(k) plan and the employer's payments to social security, which the employee seeks as a fringe benefit, amounts to $62.54 per week; the value of the 401(k) plan is not known.

3. The employers' payments for fringe benefits did not continue during the period of her disability; the inclusion of these fringe benefits in her average weekly wage would not result in that weekly benefit amount being greater than two-thirds of the state average weekly wage at the time of her injury.

CONCLUSIONS OF LAW

1. The employer's payments to social security are not a fringe benefit; they are a tax which both the employer and the employee must pay to the Federal Government as long as the employee is working.

2. As a tribunal of limited jurisdiction, the Workers' Compensation Board cannot itself declare whether or not §102(H) of the present Act is pre-empted by ERISA. This general proposition of law is codified in §152(5) which provides that this Hearing Officer may, "take action and enter orders consistent with this Act . . . " This Hearing Officer could not address the question of presumption without exceeding those powers.

3. Ms. Ciampi's fringe benefits fall within Tit. 39-A §102(4)(H) they therefore must be included in her average weekly wage.

WHEREFORE, the employee's Petition for Award is granted, the average weekly wage is established as $451.84 plus the value of the 401(k) plan.

SO ORDERED.

Dated: April 19, 1995

Portland, Maine

WORKERS' COMPENSATION BOARD

/s/ John McCurry
JOHN MCCURRY, HEARING OFFICER

A true copy ATTEST

/s/ John J. Jolicoeur
WCB CLERK